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Comptroller General  
of the United States

Washington, D.C. 20548

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## Decision

**Matter of:** PMX Industries, Inc.

**File:** B-252135

**Date:** April 23, 1993

Matthew S. Perlman, Esq., and Richard J. Webber, Esq., Arent, Fox, Kintner, Plotkin & Kahn for the protester. Kenneth B. Weckstein, Esq., Epstein, Becker & Green, P.C., for Olin Corporation, an interested party. Samuel D. Kreiter, Esq., Department of the Treasury, for the agency. Christine F. Bednarz, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Protest that agency improperly used a basic ordering agreement (BOA) to disqualify the protester, an unapproved supplier of cupro-nickel clad strip, from bidding under an invitation for bids (IFB) is untimely when filed after bid opening and the rejection of the protester's bid, because the IFB stated, and the agency confirmed, that it would only accept bids from suppliers that held BOAs prior to bid opening.

2. Untimely protest that agency used a basic ordering agreement to restrict competition will not be considered under the significant issue exception to the timeliness rules, since it is not of widespread interest to the procurement community and has been considered on the merits in previous decisions.

### DECISION

PMX Industries, Inc. protests the procurement procedures employed by the Department of the Treasury, United States Mint, in awarding a contract for the processing, fabrication, and delivery of cupro-nickel clad strip to Olin Corporation under invitation for bids (IFB) No. USM 87-8000-93-2. Under the protested procedure, the Mint entered into Basic Ordering Agreements (BOA) with potential clad strip suppliers and then permitted only these BOA holders to submit sealed bids. PMX claims that this procedure represents an invalid prequalification requirement and improperly

restricts competition. PMX also claims that the Mint improperly denied it the opportunity to qualify for a BOA and that the Mint was required to consider PMX's bid on the IFB.

We dismiss the protest.

The Mint published a synopsis of its requirement for cupro-nickel clad strip in the Commerce Business Daily (CBD) on December 11, 1992. The CBD announcement stated that the Mint purchases clad strip on a quarterly basis, and that the current requirement was for the period of April 1993 through December 1993. The announcement also stated that the Mint purchases clad strip by soliciting suppliers who had entered into identical BOAs with the Mint and by competing the current requirement among such BOA holders on the basis of price alone. The announcement encouraged interested firms to apply for a BOA and to submit with their applications information bearing upon their ability to supply the clad strip.

The Mint issued the IFB on December 21, 1992. The IFB provided for the receipt of sealed bids from "current BOA holders" and incorporated the terms of the Master BOA, issued in 1987 as TM 87-8000. The BOA set forth the requirements governing the submittal of bids, stating that a "responsive bid from BOA-holders must be received" by the specified bid opening date. Likewise, the BOA elsewhere stated that it would be applicable to any purchase order "if and when the BOA holder submits a bid and the government accepts that bid."

The record reflects that the agency placed PMX on the bidder's mailing list for this procurement, per its request, in June 1992. By letter dated September 14, 1992, the protester requested that the agency initiate the application process for entering into a clad strip BOA with PMX. In response, the Mint advised that it was revising the 1987 Master BOA and would issue the revised BOA shortly to commence the application process. PMX requested the revised BOA documents on October 26 and November 24, at which point the agency advised that it hoped to complete the documents in time for a December 2 visit to the protester's site. At this site visit, agency personnel advised PMX that the Mint had decided to conduct the procurement under the 1987 BOA, rather than a revised BOA, and that it would furnish PMX the 1987 BOA, as updated.<sup>1</sup>

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<sup>1</sup>It appears from the record that the Mint's decision to return to the 1987 BOA resulted from its failure to procure a quantity of the clad strip metals from the Defense Logistics Agency, which eliminated the need to issue a

By letter dated December 16, the protester requested the 1987 BOA documents and also sought a delay in the issuance of the IFB to permit it to qualify for a BOA.<sup>2</sup> The agency received this letter the day after it issued the IFB and established January 11, 1993, as the bid opening date. The agency advised the protester in a December 29 telephone conversation that time constraints did not permit a delay in the bid opening date and that PMX could not bid on the clad strip requirement without a BOA. The agency reiterated these points in another telephone conversation on January 4, 1993. In the January 6 cover letter forwarding the 1987 BOA documents, the Mint denied PMX's request for a delay in the bid opening date, notwithstanding PMX's "eagerness to enter the clad strip arena." In a January 7 telephone conversation, the agency again informed PMX that it must hold a BOA prior to submitting a bid and that the BOA approval process took "a couple of weeks."

In response, the protester wrote to the contracting officer on January 7 that:

"PMX may not be eligible to bid on the [IFB] for cupro-nickel clad strip, due for public bid opening January 11, 1993. Your reasons for PMX's ineligibility, as I understand it, are that prior to bid opening, PMX must be a qualified BOA holder for the clad strip and any request for a modification of the next solicitation's bid opening date cannot be made due to current production requirements."

The letter ended with a request that the agency "waive the BOA requirement so that PMX's clad strip bid will be valid on January 11, 1993."

The contracting officer denied the protester's request for a waiver of the BOA requirement by letter of January 8, stating that PMX "must become a qualified BOA holder under the Clad Strip BOA prior to the submission and/or the Mint's acceptance of a bid. Bid can only be submitted by qualified BOA holders."

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revised BOA altering the terms of the 1987 instrument.

<sup>2</sup>The record contains evidence that PMX's proposed subcontractor for this procurement had obtained the unmodified 1987 BOA documents in October and delivered them to PMX at that time.

On the January 11, 1993, bid opening date, the agency received bids from PMX and Olin.<sup>1</sup> PMX accompanied its bid with a BOA application, which it received by mail from the agency on January 8. Although PMX was the apparent low bidder, the agency rejected its bid on January 28 because PMX was not a clad strip BOA-holder as of bid opening. On January 29, PMX filed this protest with our Office, which it then supplemented on February 3. On February 26, in accordance with the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3553(c)(2) (1988), the agency authorized the award of a delivery order to Olin, notwithstanding this protest, on the basis of urgent and compelling circumstances.

In its protest, PMX alleges that the use of a BOA to restrict competition constitutes an improper prequalification requirement under 41 U.S.C. § 253c(c)(4) (1988), and violates the competition requirements contained in Part 6 of the Federal Acquisition Regulation, which are applicable to BOAs. FAR § 16.703(d). PMX claims that, since the requirement is improper and the Mint unreasonably delayed PMX's prequalification, its bid should not have been rejected.

We dismiss the protest as untimely, since the protested procedure was apparent from the face of the IFB and should have been protested as a solicitation impropriety prior to the time of bid opening. 4 C.F.R. § 21.2(a)(1). The IFB stated that the agency would receive sealed bids from "current BOA holders." The IFB also incorporated the terms of the 1987 Master BOA, which PMX received prior to bid opening and which likewise required the bidder to obtain a BOA prior to bid opening, stating that a "responsive bid from BOA-holders must be received" by the specified bid opening date. We also note that the CBD announcement for this procurement clearly specified that the competition would be among BOA holders and that firms wishing to participate must apply to become a BOA-holder. Since it was clear from the IFB that the agency intended to restrict the submission of bids to current BOA holders, PMX was required to protest any alleged anti-competitive effects flowing from this requirement prior to bid opening. Id.

PMX claims that the fact that the agency furnished it the BOA documents 3 days prior to bid opening led it to believe that its bid would be accepted, such that we should measure protest timeliness from the time its bid was unexpectedly

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<sup>1</sup>Olin held a BOA for clad strip at the time of bid opening; it is currently the only supplier that holds a BOA for this commodity with the Mint.

rejected. PMX also claims that the Mint improperly denied it the opportunity to compete for this requirement by disregarding PMX's repeated requests for the BOA documents until the eve of bid opening, thereby frustrating PMX's efforts to qualify for a BOA prior to bid opening.

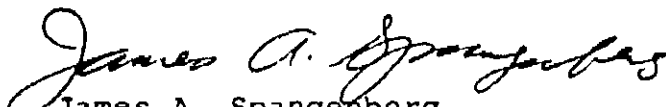
The record makes clear that PMX was aware, during its efforts to obtain the BOA documents following the IFB's issuance, that the agency considered the BOA requirement to be firm and, therefore, did not view PMX as eligible to submit a bid, notwithstanding any delays caused by the Mint. That PMX understood the agency's interpretation of the IFB requirements is evidenced by its January 7, 1993, letter to the contracting officer, which stated, "your reasons for PMX's ineligibility, as I understand it, are that prior to bid opening, PMX must be a qualified BOA holder." Also, the agency appended a cover letter to the BOA documents furnished to the protester that recognized PMX's "eagerness to enter the clad strip arena," but declined to grant the requested delay in bid opening that would have enabled PMX to compete. Finally, on January 8, the Mint denied PMX's request for a waiver of the BOA eligibility requirement, the only other avenue by which the protester might have entered the competition. Since the protester was well aware of the agency's interpretation of the specifications--an interpretation clearly supported by the IFB language--PMX was required to protest the BOA eligibility requirement contained in the IFB prior to bid opening. Id.; Custom Training Aids, Inc., B-241446.2, Feb. 12, 1991, 91-1 CPD ¶ 151.

PMX suggests that we should consider its protest under the "significant issue" exception to the timeliness rules, because the procedure protested--the Mint's use of a BOA to restrict competition prior to bid opening--presents a unique issue not previously considered by our Office. The timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Air Inc.--Recon., B-238220.2, Jan. 29, 1990, 90-1 CPD ¶ 129. In order to ensure that the timeliness rules are meaningful, our Office strictly construes the significant issue exception to embrace only those issues that pose widespread interest to the procurement community and that have not been considered on the merits in a previous decision. DynCorp, 70 Comp. Gen. 38 (1990), 90-2 CPD ¶ 310.

Contrary to the protester's allegations, our Office has considered on several occasions an agency's use of a BOA to restrict competition, even where the agency has used a BOA requirement to exclude suppliers that may be capable of

furnishing acceptable products, which resulted in a sole-source award in favor of the BOA contractor. See e.g., Hoffert-Marine, Inc., B-202879, Oct. 20, 1981, 81-2 CPD ¶ 321; RAM Enters., Inc., B-198681, Oct. 14, 1980, 80-2 CPD ¶ 274; See Rotair Indus.; D. Moody & Co., Inc., B-190392, Dec. 13, 1978, 78-2 CPD ¶ 410; Tymshare, Inc., B-190663, April 26, 1978, 78-1 CPD ¶ 322; D. Moody & Co., Inc., B-187968, Sept. 28, 1977, 77-2 CPD ¶ 233; Fairburn Marine Aviation, B-187062, Dec. 22, 1976, 76-2 CPD ¶ 523. While the protester suggests that the Mint's "outrageous" and illegal conduct in this case warrants our consideration,<sup>4</sup> we will not waive our timeliness rules to reach an issue that relates only to the conduct of a single procurement, even if the record indicates a material impropriety by the agency. DynCorp, supra.

We dismiss the protest.

  
James A. Spangenberg  
Assistant General Counsel

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<sup>4</sup>The protester argues that our failure to consider its protest could result in a recurring problem since the Mint has not abandoned its BOA requirement and PMX may face exclusion in future clad strip procurements. We are advised that the agency is currently reviewing PMX's completed application for a clad strip BOA. Thus, assuming that PMX's application satisfies the requirements necessary to obtain a BOA, PMX will be able to compete for the Mint's next quarterly requirement for clad strip.